STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals,
Judges D. Holbrook, Jr., H. Hood, R. Griffin

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

Supreme Court No. 119429
Court of Appeals No. 230811
Lower Court No. 00-18277-FC-1

PAUL LEWIS PHILLIPS, JR.,
Defendant-Appellee.

BRIEF OF *AMICUS CURIAE* CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

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COUNTER STATEMENT OF QUESTIONS PRESENTED

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The trial court answered	"Yes"
The Court of Appeals answered	"Yes"
Plaintiff-Appellant answers	"Yes"
Amicus Curiae PAAM answers	"Yes"
Defendant-Appellee answers	"No"
Amicus CDAM answers	"No"

II. DOES MCR 6.201 CONTROL DISCOVERY IN A CRIMINAL CASE?

The trial court did not resolve this question	
The Court of Appeals answered	"Yes"
Plaintiff-Appellant answers	"Yes"
Amicus Curiae PAAM answers	"No"
Defendant-Appellee answers	"Yes"
Amicus CDAM answers	"Yes"

III. DO MCR 6.201 OR MCL 767.94a AUTHORIZE A TRIAL COURT TO COMPEL DISCLOSURE OF A DEFENSE?

The trial court did not consider this question	
The Court of Appeals did not consider this question	
Plaintiff-Appellant answers	"Yes"
Amicus Curiae PAAM answers	"Yes"
Defendant-Appellee answers	"No"
Amicus CDAM answers	"No"

IV. DOES MRE 705 GIVE THE TRIAL COURT DISCRETION TO ORDER DISCOVERY OF A DEFENSE EXPERT'S OPINION?

The trial court did not consider this question	
The Court of Appeals did not consider this question	
Plaintiff-Appellant answers	"Yes"
Amicus PAAM answers	"Yes"
Defendant-Appellee answers	"No"
Amicus CDAM answers	"No"

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Defendant is charged with second degree murder, MCL 750.317, operating a motor vehicle while intoxicated causing death, MCL 257.625(4), and manslaughter with a motor vehicle, MCL 750.321. On February 28, 2000, three weeks after the preliminary examination, the prosecutor served a written form entitled "Request for Discovery" upon defense counsel. On April 10, 2000, the prosecutor moved to strike certain defense witnesses, claiming that Defendant's response to the discovery request was insufficient for failure to provide witness addresses, witness statements, and expert witness reports. The court entered an order on May 15, 2000, providing that Defendant provide the addresses, statements, if any, and any expert reports within 30 days. In response, Defendant provided a witness list with addresses on July 25, 2000, and identified three potential experts.

On August 25, 2000, the prosecutor moved to strike the defense witnesses, because the defense had not provided witness statements and expert reports. The prosecutor alleged that Defendant was attempting to subvert the court rule by not having expert witnesses prepare reports[1] and that it was at a disadvantage because it could not obtain discovery as in civil cases. Defendant filed an answer, and the court heard the motion on September 5, 2000.[2] The prosecutor argued that reciprocal discovery was meaningless if defense counsel were allowed to not have his experts write a report. T 9/5/00, p. 10. Defense counsel replied that his experts had taken measurements and

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[1] See *People v Dedrick Lamar Thomas*, (MCOA docket # 232285, unpublished opinion, 11/1/02), discussed in Part IA(1), *infra*, wherein the Saginaw County Prosecutor's office employed the same tactic it complains of here in not having police prepare reports of interviews with defense alibi witnesses.

[2] The record of the hearing reflects that the trial had been adjourned for reasons other than the discovery issue. Transcript, 9/5/00,3-6.

photographs, but that the experts did not prepare reports, though one had written a letter which could be construed as a report and which he would turn over to the prosecutor. T 9/5/00, 11. The court stated that it believed it had the authority to order creation of the expert reports, T 9/5/00, 12, and entered an order on September 11, 2000, that "Defendant's attorney obtain reports from the defense experts and provide them ... to the People."

Defendant filed a motion to reconsider that order, which the court denied in an order on October 20, 2000, which stated that MCL 767.94a and MCR 6.201 provided the court with the discretion to order the creation of the reports. Defendant moved for a stay, which was granted, and applied for leave to appeal to the Court of Appeals. The Court of Appeals reversed the trial court in a published opinion, *People v Phillips*, 246 Mich App 201 (2001), finding that the plain language of the court rule did not authorize the trial court to order creation of a report:

> The plain language of the court rule provides that only reports "produced" by the defendant's experts are subject to disclosure. "Reports" necessarily mean only written reports that have actually been "produced." ***There is no requirement for an expert to actually create a physical report, and an expert may testify based solely on observations obtained at trial.*** MRE 703; *Webb, supra* at 277, 580 N.W.2d 884.
>
> The Supreme Court has determined that ***an expert witness' nonwritten observations and conclusions are not discoverable.*** *People v. Elston*, 462 Mich. 751, 759, 762, 614 N.W.2d 595 (2000). Further, this Court has previously determined that only statements actually written and adopted by lay witnesses are discoverable. *People v. Tracey*, 221 Mich.App. 321, 324, 561 N.W.2d 133 (1997). Therefore, the prosecutor was not entitled to the unwritten observations of defendant's expert witnesses, and the trial court erred in construing MCR 6.201.
>
> The prosecutor next argues that the trial court has the authority to modify the rules and did so in the case at bar. We disagree. The admissibility of expert witness testimony is in the trial court's discretion and will not be reversed on appeal absent an abuse of that discretion. *People v. Smith*, 425 Mich. 98, 106, 387 N.W.2d 814 (1986). However, the court rule is specific: "On good cause shown, the court may order a modification of the requirements and prohibitions of this rule." MCR 6.201(I). ***The trial court*** did not show why good cause existed and apparently ***did***

not base its decision on good cause modification but rather on the trial court's discretion. 246 Mich App at 202-203. (Emphasis added.)

The prosecutor appealed, and this Court remanded the case to the trial court for a "good cause" determination under MCR 6.201(I). On remand, for the first time, the trial court characterized its ruling as a remedy for Defendant's failure to comply with time limits regarding discovery. The trial court faulted defense counsel for initially failing to disclose the addresses of the experts, as well as for failing to provide reports from the experts. Opinion and Order on remand, February 6, 2002, Prosecutor's Appendix at 46a-47a.

The trial court's order of May 15, 2000, had ordered the defense to provide the prosecutor with the names and addresses of witnesses, their statements, and any expert reports within thirty days after the preliminary examination transcript was filed. The transcript was filed on June 21, 2000. Defendant replied to the prosecutor's discovery request in a document dated July 25, 2000, which provided the names and addresses of all witnesses. No witness statements (as defined in *People v Holtzman*, 234 Mich App 166 (1999)), nor any expert reports existed. The witness list was apparently four days late.

Amicus Criminal Defense Attorneys of Michigan submits this Brief in support of Defendant-Appellee.

I. NEITHER MCR 6.201 NOR MCL 767.94(a) EXPRESSLY AUTHORIZES A TRIAL COURT TO ORDER CREATION OF A REPORT FROM AN EXPERT WITNESS, AND SHOULD NOT BE READ BROADLY TO PROVIDE SUCH AUTHORITY.

Neither the court rule nor statute provides authority for a trial court to order the creation of an expert witness report where none exists, because: (A) the plain language of the rule and statute do not authorize it, and Michigan precedent does not provide such authority; (B) federal and other state cases have held no such authority exists; and (C) creation of a report should not be available as a sanction for discovery violations (though there were none in this case).

A. Neither MCR 6.201 nor MCL 767.94a Authorize a Trial Court to Order Creation of a Report.

MCR 6.201 does not provide authority to order creation of a report; it compels the production of reports already "produced" by or for an expert, as the Court of Appeals correctly noted here. The rule reads in relevant part:

> **RULE 6.201 DISCOVERY**
>
> **(A) Mandatory Disclosure**. In addition to disclosures required by provisions of law other than MCL 767.94a; MSA 28.1023(194a), a party upon request must provide all other parties:
>
> * * *
>
> (3) any report of any kind produced by or for an expert witness whom the party intends to call at trial. . .

This rule simply does not address production of a report not already in existence. Nor does MCL 767.94a, which refers only to reports already "prepared":

> Sec. 94a. (1) A defendant or his or her attorney shall disclose to the prosecuting attorney upon request the following material or information within the possession or control of the defendant or his or her attorney:
>
> * * *
>
> (c) Any report or statement by an expert concerning a mental or physical

examination, or any other test, experiment, or comparison that the defendant intends to offer in evidence, or that was prepared by a person, other than the defendant, whom the defendant intends to call as a witness, if the report or statement relates to the testimony to be offered by the witness.[3]

Neither the plain language of the court rule nor the statute give a trial court the authority to order creation of a report by an expert witness. Nor does any Michigan precedent, civil[4] or criminal, give a trial court such authority. Given the absence of authorization, the prosecutor's principal argument here is that it is unfair that a party could avoid disclosure of an expert witness report simply by not requesting that the expert write a report, as though that is not a widespread practice. In fact, it is a common practice in Michigan for civil and criminal lawyers to not request reports from experts for a number of reasons.[5] No matter how detailed a report an expert prepares, opposing

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[3] The court rule and statute set different schedules for compliance with discovery requests. MCR 6.201 provides that a prosecuting attorney must comply within 7 days of a request, and a defendant must comply within 14 days of a request, while MCR 767.94a provides that a defendant shall comply with the disclosure provisions not later than 10 days before trial or at any other time as the court directs.

[4] The civil discovery rules, MCR 2.301 to 2.316, provide for interrogatories and depositions, which are the principal ways in which expert opinions are disclosed in civil litigation. Those rules are extensive and obviously inapplicable to criminal cases, and have never been so applied. The suggestion of Amicus Prosecuting Attorneys Association of Michigan that the civil discovery rules should be applied in criminal cases, would be welcome, because it would allow criminal defendants to thoroughly prepare in advance of trial through depositions and interrogatories, but the limited issue in this case does not pose that revolutionary issue. Other states, such as Florida and Arizona, do provide for criminal discovery interviews and depositions.

[5] This tactic of not reducing information to discoverable form is familiar to the Saginaw County Prosecutor, despite its protestations in this case. *People v Dedrick Lamar Thomas*, (MCOA # 232285, unpublished opinion, 11/1/02), which also arose in Saginaw County, involved a related discovery issue. There the defendant offered an alibi defense, and complained on appeal that the trial court erred in refusing to grant a mistrial at the outset of trial on the grounds that the prosecutor had failed to disclose notes made by the police while interviewing defendant's alibi witnesses. The Court of Appeals adopted the prosecutor's argument that since the police officers' notes had not been reduced to police reports, they were not discoverable, and that the

counsel will use the expert's own report as fodder for cross examination, either in a deposition in a civil case or at trial in a criminal case. Expense can also be a factor; many experts charge a high hourly rate which can be of concern if the expert is asked to draft and edit a report.[6]

Several Michigan criminal cases, support the proposition that a party has no obligation to render otherwise undiscoverable materials discoverable by reducing them to discoverable form. In *People v Elston*, 462 Mich 75, 762 (2000), this Court held that a doctor's personal observations which were not reduced to writing were not required to be disclosed under MCR 6.201(A)(3). In *People v Holtzman, supra*, the Court of Appeals held that a "statement," for purposes of reciprocal discovery, is a written statement signed or otherwise adopted or approved by the person making it, or a recording or transcription of it which is a substantially verbatim recital of the statement and is contemporaneously recorded, and therefore a prosecutor's notes of interviews were not "statements" subject to the rule.[7] In *People v. Tracey*, 221 Mich App 321, 324, (1997), the prosecutor interviewed the complainant the night before trial but did not record her statement, and the Court of Appeals held that the prosecutor therefore had no obligation to disclose that statement to the defense. See also, *People v Thomas, supra*, at fn. 4.

The history behind the adoption of MCR 6.201 also supports the proposition that a party has

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notes did not constitute discoverable witness "statements", as defined in *People v Holtzman, supra. People v Thomas*, Slip opinion, at 1-2.

[6] Presumably, the party requesting creation of the report would be responsible for paying the price of the expert's time. See, MCR 2.302(B)(4)(c)(i) and (ii); FRCivP 26(b)(4)(C). This issue was not developed below in this interlocutory appeal.

[7] The *Holtzman* Court applied the definition of "statement" developed in civil cases, MCR 2.302(B)(3)(c). See See *Michigan Court Rules Practice*, Martin, Dean, and Webster, MCR 2.302, Authors' Comment, Part 7(e) (West Pub.). The Court further held that the notes were additionally protected by attorney work product privilege.

no obligation to have its expert produce a report. A comprehensive set of Proposed Rules of Criminal Procedure were developed by a committee of this Court prior to the adoption of MCR 6.201 in 1994. The discovery rules, proposed Chapter 6.200, were extensive but were not adopted. 422A Mich at 65-106. Proposed Rules 6.202(2) and 6.205(3) would have required both prosecution and defense to disclose reports ***or statements*** by expert witnesses. The commentary suggested that these rules were modeled on FRCrP 16.[8] Commentary to proposed Rule 6.202(2), 422A Mich at 71. Arguably, the proposed rules would have required the parties to disclose the intended testimony of their expert witnesses in some form, perhaps as summaries as required in FRCrP 16, even where a report had not been prepared. But the proposed rule was not adopted, and 6.201 only governs reports already in existence. Had this Court intended to change Michigan practice in 1994 to require either creation of reports or summaries, it could have done so.

Neither the plain language of the rule nor the history of discovery, civil or criminal, in Michigan supports the proposition that a trial court has the authority to order that an expert witness create a report. Furthermore, Michigan practice, both civil and criminal, is to the contrary, and should this Court be considering revolutionary changes to the law of discovery, this interlocutory appeal is not an appropriate vehicle to rewrite the law. Such revisions should be done through the rule making process, where there is much wider opportunity for comment and input, including the from civil bar, which will not be heard in this appeal but would experience the impact of such a change.

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[8] Unlike MCR6.201, FRCrP 16 requires counsel to provide written summaries of the intended testimony of expert witnesses in addition to reports, where reports exist, although the reciprocal requirement that the defense provide the summaries is not triggered unless the defense has made a request for discovery of experts and the government has already complied. This brief addresses FRCrP 16 more fully in Part I(A)(2), *infra*.

B. The Law of Discovery in Other Jurisdictions.

The prosecutor argues that since neither the court rule nor statute prohibit ordering creation of a report, a trial court has the inherent authority to do so. There is no Michigan precedent for this proposition. Cases from federal and other state courts which have addressed the issue have held that reciprocal discovery rules which lack an express requirement that an expert prepare a report do not authorize a trial court to order creation of one.

1. The Federal Rules.

Discovery in federal criminal cases is governed by FRCrP 16.[9] Rule 16(a)(1)(D)does not

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[9] The sections of Rule 16 relevant to this discussion are:

Rule 16. Discovery and Inspection

(a) Governmental Disclosure of Evidence.
(1) Information Subject to Disclosure.

* * *

(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(E) Expert Witnesses. At the defendant's request, the government shall disclose to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government shall, at the defendant's request, disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subdivision shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications.

* * *

(b) The Defendant's Disclosure of Evidence.
(1) Information Subject to Disclosure.

* * *

require that an expert witness prepare a report, but does require that if the government intends to call an expert witness, it must disclose to the defense a written summary of the expert's expected testimony, and the summary "shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications." A defendant has a reciprocal duty to disclose a summary which must include the same information. FRCrP 16(b)(1)(C). However, the defendant's reciprocal duty to disclose is not triggered unless and until the defendant has made a request for discovery under 16(a)(1)(D) and the government has already complied.[10] Federal cases interpreting Rule 16 have universally held that it does not require the creation of reports not already in existence. Before turning to those cases, the history of Rule 16 deserves some attention.

The reciprocal discovery provisions of FRCrP 16 regarding expert witnesses were added in the 1993 amendments to the rule. At the same time, FRCivP 26(a)(2)(B) regarding the disclosure

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(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony.

(C) Expert Witnesses. Under the following circumstances, the defendant shall, at the government's request, disclose to the government a written summary of testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial: (i) if the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, or (ii) if the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition. This summary shall describe the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications.

[10] This triggering provision was inserted in the 1975 amendment to Rule 16 in response to concerns in the House of Representatives about the constitutionality of non-recpirocal discovery, apparently based upon *Wardius v Oregon*, 412 US 470, 93 SCt 2208, 37 LED2d 82 (1973), discussed *infra*.

of expert witnesses was also amended to require that when a party discloses an expert witness, the witness must simultaneously provide a complete written report, stating the testimony the witness is expected to present and the reasons therefor.[11] At the time the amendments to the civil and criminal rules were proposed, the proposed amendment to Rule 16 contained a requirement that an expert witness provide a signed report written by the witness, similar to FRCivP 26.[12] That proposal was

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[11] Rule 26 provides in relevant part:

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

[12] The Preliminary Draft of Proposed Rule 16(a)(1)(E) read:

(E) EXPERT WITNESSES. Upon request of a defendant, the government shall disclose to the defendant any evidence which the government may present at trial under Rules 702, 703, or 705 of the Federal Rules of Evidence. This disclosure shall be in the form of a written report prepared and signed by the witness that includes a complete statement of all opinions to be expressed and the basis and reasons therefor, the data or other information relied upon in forming such opinions, any exhibits to be used as a summary of or support for such opinions, and the qualifications of the witness.

The Preliminary Draft of Proposed Rule 16(b)(1)(C) read:

(C) EXPERT WITNESSES. If the defendant requests disclosure under subdivision (a)(1)(E) of this rule, upon compliance with the request by the government, the defendant, on request of the government, shall provide the government with a written report prepared and

abandoned because the US Department of Justice strongly opposed it, and the text of Rule 16 requiring only a summary was adopted instead. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Report on Proposed and Pending Rules of Criminal Procedure and Rules of Evidence, May 14, 1992, page 2.[13] (A copy is attached.)

Authority for the proposition that Rule 16 requires only disclosure of reports already in existence and does not require the creation of reports is widespread. See, *e.g., US v Johnson*, 713 F2d 654, 659 (CA11, 1983)(since expert prepared no report, there was no basis to exclude his testimony); *US v Tejada*, 886 F2d 483, 485-486 (CA1, 1989)(government not required to create report describing expected testimony of agents who characterized notebook as a drug ledger); *US v Holland*, 884 F2d 354 (CA8, 1989)(report of chemical analysis did not exist until first day of trial, prior disclosure not required); *US v Gowen*, 32 F3d 1466, 1470 (CA10, 1995)(test not completed until after trial began properly disclosed when report completed); *US v Shue*, 766 F2d 1122 (CA7, 1985)(Rule 16 did not require government to disclose that an FBI expert used a magnifying glass to compare a photo of defendant with photos of bank robber where expert made no written report).

Moore's Federal Practice, (3rd Edition, 1997), Section 616.05[2], p. 616-59 states succinctly:

> [T]he Rule [FRCrP 16] has been interpreted as requiring discovery only of written reports and written test results. An expert's conclusions, orally communicated to the prosecutor, are not discoverable even if the expert is called to testify by the government.

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signed by the witness that includes a complete statement of all opinions to be expressed and the basis and reasons therefor, the data or other information relied upon in forming such opinions, any exhibits to be used as a summary of or support for such opinions, and the qualifications of the witness.

[13] The Committee Report does not state the reasons for the Justice Department's opposition.

Moore cites several cases in support, most notably *US v Peters*, 937 F2d 1422, 1425 (CA9, 1991), and *US v Glaze*, 643 F2d 549, 552 (CA8, 1981). In *Peters*, (decided before the 1993 amendment requiring summaries of expert witness testimony), the Court held that the plain language of Rule 16 did not require disclosure by the defense of an unwritten expert opinion. In *Glaze*, the Court held that Rule 16 did not require disclosure by the government of a field test of cocaine performed by a government agent where the fact and results of the test had not been reduced to writing.

Federal law regarding criminal discovery does not require production of reports not in existence, and cases decided before the 1993 amendment held that absent express authorization, FRCrP 16 did not require disclosure of an expert's unwritten opinion through creation of a report. FRCrP 16 now expressly requires disclosure of a summary by counsel on request. Like the federal rule before the 1993 amendment, the plain language of MCR 6.201 contains no such requirement, and it should not be interpreted to include one.[14]

2. Other States.

The issue in this case has not arisen frequently in reported cases from other states. However, several states have addressed the issue and have held that their trial courts do not have the authority to order creation of an expert report.

In *State v Hutchinson*, 766 P2d 447 (WA, 1989), the trial court initially ordered defense counsel to prepare and disclose a summary of the anticipated testimony of any expert witnesses who had not prepared written reports. Defense counsel prepared a short summary. The prosecutor was

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[14] Ä committee of this Court is currently reviewing potential revisions to the Michigan Rules of Criminal Procedure, and among the items under consideration are amendments to the discovery rules. The rule process is a far more appropriate venue to consider the possible changes in the law of discovery posed by this Court's leave grant than this narrow case, which is still in the interlocutory appeal stage.

not satisfied and filed a motion compel discovery, and the trial court ordered that defense counsel disclose "full written reports" by the experts. On appeal, the Washington Supreme Court held that the plain language of the court rule governing discovery, which required disclosure of "any reports or results, or testimony relative thereto" of experts, required disclosure of existing reports but did not require the preparation of such reports. *Id* at 450. Analogizing to FRCrP 16, the Court noted that under the federal rules governing criminal (and civil) discovery, a party could not be forced to have a report prepared, but only to disclose reports already in existence. *Id* at 451. The Court rejected the state's argument that a trial court had the inherent authority to order creation of a report as a sanction in a case where a party failed to comply with the rule. The Court noted that in *Wardius v Oregon*, 412 US 470, 93 SCt 2208, 37 LED2d 82 (1973), the Supreme Court had cautioned that to be constitutional, discovery must be truly reciprocal, and "[i]ndeed, the State's inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor." 412 US at 475, fn. 9.[15] The Court concluded that in light of *Wardius*, even if the state had disclosed all its tangible documents in discovery, the defense was not required to produce documents that did not exist.

In *People v Purdon*, 175 Misc 2d 775, 669 NYS2d 777 (1997), the defendant filed notice of the insanity defense, and the state moved to compel defendant's psychiatric expert to prepare a written report which did not exist. The Court held the statutory language was clear and unambiguous

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[15] In *Wardius*, the Supreme Court held that where an Oregon statute precluding introduction of alibi evidence in absence of notice of alibi defense prior to trial did not provide for reciprocal discovery by the defense of prosecution witnesses, due process forbade its enforcement against defendant.

that a defendant was only require to turn over reports which were already in existence, not to create them.[16]

In *Rower v State*, 443 SE2d 839 (GA, 1994), the Court addressed a similar issue. The Georgia discovery statute required disclosure to the defense of any written expert reports the state intended to introduce in its case-in-chief or in rebuttal. Prior to *Rower*, the Georgia Supreme Court had previously held, in *Sabel v State*, 282 SE2d 61 (1981), that the state was also entitled to reciprocal discovery of defense expert reports and that a defense expert report could be required to be reduced to writing if not already written. Two years later, in *Law v State*, 307 SE2d 904 (1983), the Court held that the statute required the state to disclose only those reports which were written, and did not require the state to reduce oral reports to writing and provide those to the defense. The *Rower* Court concluded that under *Wardius*, *Sabel* erroneously granted greater discovery rights to the state than to the defense, and overruled *Sabel*. The Court held that the state was entitled only to written reports which the defense intended to introduce at trial, not the creation of new reports. In *Sears v State*, 493 SE2d 180 (GA, 1997), the Court summarized the holding:

> The defendant is not required to have the opinions of his experts reduced to writing nor is he required to produce any report that he will not offer at trial.

In *Beck v State*, 551 SE2d 68 (GA App, 2001), the prosecutor complained that the defense had delayed providing materials to his expert to review and was thereby "getting around" the discovery rules. The trial court ordered defense counsel to provide a summary of the expert's opinion to the state, and when defense counsel did not do so, refused to allow the expert to critique the state's interview methods of a child witness and limited the expert's trial testimony to

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[16] Unlike Michigan law, the New York statute requires the defense to provide a summary of the expert's expected testimony, as does FRCrP 16.

hypothetical questions. The Court of Appeals found the trial court's ruling erroneous (though not reversible) under *Royer* and *Sears,* because there was no statutory authority to order a summary.

Michigan law is in accord with the Georgia decision in *Sears v State, supra.* In *People v Elston, supra*, 462 Mich at 762, this Court held that a prosecution expert's observations which were not reduced to writing were not subject to mandatory disclosure under MCR 6.201. In light of *Elston*, this Court cannot, consistently with *Wardius*, hold that while a prosecution expert is excused from reducing his observations to writing, a defense expert can be forced to reduce his to writing. *Rower v State, supra.* Unless any disclosure requirements imposed upon the defense are reciprocally applicable to the state, they are not constitutional. *Wardius, supra.*

C. Creation of a Report Should not be a Sanction.

Defendant-Appellee's Brief explains in detail why the "good cause" finding by the trial court on remand is a transparent attempt to rewrite the record. Defendant's only apparent breach of discovery was the disclosure of the addresses of its lay witnesses just four days late.[17] The trial court's initial order to have the defense experts create reports referred only to the trial court's discretion and said nothing about it being a sanction for discovery violations. Nor is there anything

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[17] On February 28, 2000, three weeks after the preliminary examination, the prosecutor served a written form entitled "Request for Discovery" upon defense counsel. On April 10, 2000, the prosecutor moved to strike certain defense witnesses, claiming that Defendant's response to the discovery request was insufficient for failure to provide witness addresses, witness statements, and expert witness reports. (Defendant had provided the names and addresses of two experts, but had not disclosed the street addresses but only cities of his lay witnesses.) The court entered an order on May 15, 2000, providing that Defendant provide the addresses, statements, if any, and any expert reports within 30 days of the filing of the exam transcript, which occurred on June 21, 2000. Defendant provided a witness list with addresses on July 25, 2000, and identified three potential experts. The prosecution has never indicated that it was prejudiced by the four day delay in getting the witnesses' addresses. This, the only discovery violation, was *de minimis* and was not an issue at the motion hearings.

in the record at the motion hearings to indicate the issue was sanctions. Most importantly, the after the fact characterization by the trial court of the order for creation of reports as a sanction is a *non sequitur*: the alleged "remedy" has nothing to do with the violation. The issue of sanctions is not present in this appeal.

If this Court considers the subject of sanctions, however, as a matter of policy, it should not hold that creation of a report is a potential sanction generally available. Granting a trial court the authority to order creation of an otherwise non-existent report would be a revolutionary development in Michigan discovery law. A change this far reaching, with constitutional and other legal implications, is not suitable for resolution in this interlocutory appeal, but instead should subject to this Court's rulemaking process.

Instead, allowing a party to interview a witness sufficiently in advance of the witness' testimony, a practical remedy commonly used by state and federal trial courts, is preferable. In *Beck v State, supra*, for example, the Court noted that the Georgia Supreme Court has held that more drastic sanctions for discovery violations, such as exclusion of evidence, are a last resort. In Georgia, rather than excluding testimony, "an interview of the witness is the remedy for failure to comply with the requirement that a witness must be identified prior to trial; this remedy avoids the harsh sanction provided in OCGA 17-16-6 of excluding evidence not properly disclosed. *Massey v State*, 525 SE2d 694 (GA, 2000)." *Beck v State*, 551 SE2d at 73.

In this same vein, exclusion is a sanction which, while theoretically possible, can almost never be constitutionally imposed. In *Taylor v Illinois*, 484 US 400, 108 SCt 646, 98 LEd 2d 798 (1988), the Supreme Court held that the Sixth Amendment compulsory process clause may be violated by imposition of a discovery sanction that entirely excludes testimony of a material defense

witness, but the compulsory process clause does not create an absolute bar to preclusion of testimony of a defense witness as a sanction for violating a discovery rule. In *Taylor*, where the Court believed the proposed testimony was false,[18] the Court simply held that exclusion was not absolutely constitutionally barred. *Taylor* cannot be read to permit the exclusion of evidence as an appropriate discovery violation sanction in any but the extreme case.[19]

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[18] *Taylor* was premised on the falsity of the defense testimony proposed at the last minute during trial:

> ***It may well be true that alternative sanctions are adequate and appropriate in most cases***, but it is equally clear that they would be less effective than the preclusion sanction and that there are instances in which they would perpetuate rather than limit the prejudice to the State and the harm to the adversary process. One of the purposes of the discovery rule itself is to minimize the risk that ***fabricated testimony*** will be believed. Defendants who are willing to ***fabricate*** a defense may also be willing to fabricate excuses for failing to comply with a discovery requirement. The risk of a contempt violation may seem trivial to a defendant facing the threat of imprisonment for a term of years. A ***dishonest client*** can mislead an honest attorney, and there are occasions when an attorney assumes that the duty of loyalty to the client outweighs elementary obligations to the court.
>
> We presume that evidence that is not discovered until after the trial is over would not have affected the outcome. It is equally reasonable to presume that there is something suspect about a defense witness who is not identified until after the 11th hour has passed. ***If a pattern of discovery violations is explicable only on the assumption that the violations were designed to conceal a plan to present fabricated testimony***, it would be entirely appropriate to exclude the tainted evidence regardless of whether other sanctions would also be merited. 484 US 413-414. (Footnotes omitted.) (Emphasis added.)

[19] Courts are generally reluctant to find discovery violations and impose harsh sanctions. See, *e.g., People v Elston, supra.*

II. BECAUSE MCR 6.201 AND MCL 767.94a ARE PROCEDURAL ONLY, MCR 6.201 GOVERNS WHERE THERE IS CONFLICT BETWEEN THE TWO.

Where there is no conflict between a court rule and a statute, they should be read together. MCR 6.201 and MCL 767.94a do not conflict in their absence of authority for a trial court to order the a creation of a report by an expert witness. The Court of Appeals' holding that the trial court lacks the authority to order that an expert write a report where none exists is mandated by the plain language of MCR 6.201. *Phillips*, *supra*, at 202-203. The court rule requires the disclosure, upon request, "of any report of any kind ***produced*** by or for an expert witness whom the party intends to call at trial." MCR 6.201(A)(3) (emphasis added). Its plain language does not compel the creation of a report, only the production of reports which already exist. MCL 767.94a does not conflict with this rule. It requires disclosure of "[a]ny report or statement by an expert concerning a mental or physical examination, . . .that the defendant intends to offer in evidence. . ." MCL 767.94a (1)(c). Neither provision compels the creation of a report by an expert witness.

Were there a conflict between the two, however, the court rule would govern. In procedural matters, the rules established by the Supreme Court take precedence over inconsistent legislation. *People v. Langham*, 101 Mich. App. 391, 397; 300 NW2d 572 (1980). This Court has stated, in Administrative Order 1994-10, that "discovery in criminal cases heard in the courts of this state is governed by MCR 6.201 and not by MCL 767.94a; MSA 28.1023 (194a)."

Of course, this Court's constitutional rule-making authority can not "establish, abrogate, or modify the substantive law." *McDougall v. Shanz*, 461 Mich 15, 26 (1999). But discovery rules are not substantive; they are purely procedural and accordingly take precedence over MCL 767.94a where the two conflict. *People v. Sheldon*, 234 Mich. App. 68, 70-71 (1999).

III. THE TRIAL COURT LACKS THE AUTHORITY TO COMPEL DISCLOSURE OF A DEFENSE OTHER THAN ALIBI, INSANITY OR DURESS.

The Court of Appeals' holding in this case concerned only whether the trial court had the authority to order the production of a report by a defense expert where non existed. No question was raised in the trial court or in the appellate court regarding the trial court's authority to compel the disclosure of a defense. Because it has not been raised below in this litigation, and because the issues regarding compelling disclosure of a defense merit appropriate process, this court should decline to reach this issue in this context.

Michigan's rules require a criminal defendant to disclose three defenses in advance of trial: alibi, *see* MCL 768.20, insanity, *see* MCL 768.20a, and duress as a defense to a prison escape, *see* MCL 768.21b. Michigan's rules also provide for other defense disclosures in advance of trial, including names of defense witnesses, reports of defense experts, and physical evidence the defendant intends to offer at trial. MCR 6.201. MCR 6.201 was the result of a thorough and considered committee process in 1994. *See generally* 422A Mich at 65-106, proposed rule 6.205 and surrounding Note. At that time, the requirement of additional defense disclosures was contemplated, including the requirement that the defendant give notice of his or her defense. After significant debate and process, the Court declined to adopt the broader disclosure rule and instead adopted the current rule. *See id.*

The Court's concerns in 1994 are still valid. When a defendant is required to provide information in advance of trial, courts have to navigate constitutional and other legal limits as well as policy concerns. *See* Wright, *Federal Practice and Procedure: Criminal 3d*, section 256, pp 168-176(2000)("Constitutional doubts have always overhung discovery by the prosecution in criminal

cases.")

Specifically, the defendant's Fifth Amendment privilege against self-incrimination, Sixth Amendment right to counsel, and the attorney-client and work-product privileges require caution in compelling the defendant to give information to the government before trial. *See generally*, ABA Standards for Criminal Justice 11-6.1(d) (the provision prohibiting disclosure of the defendant's communications in discovery is "included to protect the defendant's Fifth Amendment privilege against compelled self-incrimination. In addition, insofar as the defendant has communicated with defense counsel, material reflecting those communications is also subject to the defendant's Sixth Amendment right to counsel."). Given that this question is not posed in this litigation, and given that this Court has a functioning criminal rules revision committee for vetting all of these concerns before making broad changes with important implications, this Court should not reach out to decide this unnecessary and unposed issue in this interlocutory appeal.

IV. MRE 705 IS AN EVIDENCE RULE GOVERNING THE ORDER OF TRIAL TESTIMONY ONLY, IS NOT A PRETRIAL DISCOVERY RULE, AND PROVIDES NO AUTHORITY TO ORDER CREATION OF A REPORT BY AN EXPERT.

MRE 705 reads as follows:

> **RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION**. The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

This rule is identical to FRE 705. No Michigan case has ever treated MRE 705 as a pretrial discovery rule. Michigan cases only discuss its application to trial testimony, and the order of proofs.

Nor have the undersigned been able to find federal cases which have treated FRE 705 as a pretrial discovery rule. Judge Weinstein states the likely reason no such cases exist: the rule was not meant to provide a basis for pretrial discovery but only to govern the trial testimony of an expert, and it merely complements the civil and criminal discovery rules.

> Because ***Rule 705 applies to the trial testimony of an expert***, it does not conflict with requirements under the Federal Rules of Civil Procedure or the Federal Rules of Criminal Procedure, which require pretrial disclosure of the basis an reasons for an expert's opinions. *Weinstein's Federal Evidence*, 2nd Edition, Section 705.06, p. 705-10 (Matthew Bender & Co., Inc., 1997). (Footnotes omitted.) (Emphasis added.)

If MRE 705 were read as a source of authority for pretrial discovery, it would conflict with the civil and criminal discovery rules, because it would make prior disclosure of the bases for an expert's opinion discretionary with the trial court, while the discovery rules are principally non-discretionary. The rule governs only the admissibility of trial testimony and should not be construed as providing authority to govern discovery, which it was never intended to cover.

SUMMARY AND RELIEF REQUESTED

Amicus Curiae Criminal Defense Attorneys of Michigan request that this Court affirm the decision of the Court of Appeals.

Criminal Defense Attorneys of Michigan

Dated: November 25, 2002

by: _____

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEDRICK LAMAR THOMAS,

Defendant-Appellant.

UNPUBLISHED
November 1, 2002

No. 232285
Saginaw Circuit Court
LC No. 00-018443-FH

Before: Cooper, P.J., and Jansen and R. J. Danhof*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; two counts of assault with intent to commit murder, MCL 750.83; and felony-firearm, MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of 7 to 15 years for the assault with intent to do great bodily harm conviction and 20 to 40 years for each of the assault with intent to commit murder convictions. Defendant also received two years' imprisonment for the felony-firearm conviction to be served consecutive to his other sentences. Defendant appeals as of right. We affirm.

This appeal arises out of a drive-by shooting that resulted in injury to a man and a two-year old child. Several witnesses gave descriptions of the car and the shooter. The two men who were fired upon subsequently identified defendant as the shooter and picked him out of a photographic line-up. Defendant testified that he was with a friend at the time of the shooting.

Defendant initially alleges that his right to due process was denied by the prosecution's failure to disclose notes made by the police while interviewing defendant's alibi witnesses. Defendant also claims that his rights were further infringed by the police and the prosecution's belated investigation into his alibi. Thus, defendant contends that the trial court should have granted his motion for mistrial at the conclusion of the opening statements. We disagree. This Court reviews a trial court's refusal to grant a mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Cunningham*, 215 Mich App 652, 654; 546 NW2d 715 (1996).

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

A prosecutor is required to disclose material evidence that is favorable to the defendant. *People v Fink*, 456 Mich 449, 454; 574 NW2d 28 (1998). "Evidence is material only if there is a reasonable probability that the trial result would have been different, had the evidence been disclosed." *Id.* Upon request, the prosecution must also provide the defendant with any police reports concerning the case. MCR 6.201(B)(2). Similarly, MCR 6.201(A)(2) requires disclosure of "any written or recorded statement by a lay witness whom the party intends to call at trial . . . ." However, the term "statement" in this context does not pertain to notes made in the course of an investigation unless the witness signs or adopts the notes. See *People v Holtzman*, 234 Mich App 166, 178-179; 593 NW2d 617 (1999).

In the instant case, the information obtained through the interviews was not exculpatory or favorable to defendant. Rather, the witnesses interviewed either failed to identify defendant or could not place him in their respective stores at the time of the incident. Moreover, no formal police report was ever made regarding the interviews. Further, while the detective made notes of the interviews, none of the witnesses signed or otherwise adopted these notes.[1] We also note that due process does not require the police to seek and find alleged exculpatory evidence for defendant. *People v Sawyer*, 222 Mich App 1, 6; 564 NW2d 62 (1997). Accordingly, we find no abuse of discretion in the trial court's decision to deny the motion for a mistrial. *Dennis, supra* at 572.

Defendant next maintains that the photographic line-up was unduly suggestive. We disagree. The admission of identification evidence is reviewed for clear error. *People v McAllister*, 241 Mich App 466, 472; 616 NW2d 203 (2000). However, defendant's failure to object to the photographic line-up limits our review to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). The relevant factors to be considered include: the witness' opportunity to view the criminal at the time of the crime; the witness' degree of attention; the accuracy of any prior description; the level of certainty displayed by the witness at the time of the pretrial identification; and the amount of time between the crime and the confrontation. *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998).

Defendant primarily contends that the individuals chosen for the array were either darker skinned or bore no resemblance to his picture. We note that only physical differences apparent to the witness and that substantially distinguish defendant from the other line-up participants are significant. *Hornsby, supra* at 466; see also *People v Richmond*, 84 Mich App 178, 181; 269 NW2d 521 (1978). Further, such differences usually affect the weight of the evidence and not its admissibility. *Hornsby, supra* at 466.

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[1] The record shows that at the conclusion of opening statements the trial court ordered the prosecution to provide copies of these notes to defendant.

Nevertheless, the totality of the circumstances in the instant case does not suggest that the photographic line-up was so impermissibly suggestive that it led to defendant's misidentification. *Hornsby, supra* at 466. In fact, the witnesses testified that they knew defendant. One of the witnesses went to high school with defendant and the other recognized his face from the area. These two witnesses identified defendant as the shooter from an array of six photographs. The record shows that the witnesses had an opportunity to see the shooter at the time of the crime and described him as being light skinned, clean shaven, and having braided hair. Moreover, the identification took place within two days of the shooting. The record does not indicate that the witnesses expressed any uncertainty when identifying defendant. Furthermore, only two weeks passed between the date of the crime and the preliminary examination. See *Colon, supra* at 696 (finding that a two week time span does not reduce the reliability of the identification). On this record, we find no plain error. *Carines, supra* at 763-764.

To establish ineffective assistance of counsel, defendant must show that but for counsel's error, the result of the proceedings would have been different. See *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Because there is no indication from the record that the witnesses' identification of defendant from the photographic line-up was due to any improper influences, defendant has failed to prove that his counsel was ineffective. *Id.*

Defendant further contends that he was denied a fair trial because the prosecution improperly introduced hearsay evidence of a witness' identification of defendant without first establishing an adequate foundation. We disagree. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Knapp,* 244 Mich App 361, 377; 624 NW2d 227 (2001). However, if the decision involves a question of law this Court will review the issue de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Nevertheless, defendant's failure to object to this testimony limits our review to plain error affecting his substantial rights. *Carines, supra* at 763-764.

Pursuant to MRE 801(d)(1), a prior statement is not hearsay if "[t]he declarant testifies at the trial . . . [,] is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving the person . . . ." At trial, Frank Gaskew testified that he never saw the shooter. Mr. Gaskew further claimed that he could not remember speaking with police officers about the shooting or identifying defendant as the shooter. Because Mr. Gaskew was subject to cross-examination concerning his prior statement in which he identified defendant as the shooter, the contested testimony was not hearsay. MRE 801(d)(1). Thus, defense counsel was not ineffective for failing to object. See *Carbin, supra* at 599-600; *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Defendant additionally opines that he was denied a fair trial when a police officer testified that he obtained a photo of defendant that the police had "from the past." We disagree. Because defendant did not object to this testimony, our review is limited to plain error affecting his substantial rights. *Carines, supra* at 763-764.

Police witnesses have a special obligation to avoid venturing into forbidden areas while testifying. *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983). However, "an isolated or inadvertent reference to a defendant's prior criminal activities" does not justify reversal. *People v Wallen*, 47 Mich App 612, 613; 209 NW2d 608 (1973). In this case, the detective's comment about a "photo from the past" was brief, vague, and not inherently

prejudicial. See *id.*; *People v Eaton*, 114 Mich App 330, 337; 319 NW2d 344 (1982). This vague reference to a possible criminal record was also not deliberately injected into the proceedings. *Wallen*, *supra* at 613. Numerous witnesses identified defendant as the shooter, and the vague reference to a past photograph did not divert the jury from the evidence properly presented.

We further find that defense counsel's failure to object to this testimony did not rise to the level of ineffective assistance. See *Carbin*, *supra* at 599-600. It may have been trial strategy to refrain from objecting and therefore highlight the testimony. See *People v Rodgers*, 248 Mich App 702, 718; 645 NW2d 294 (2001). We will not substitute our judgment for that of trial counsel regarding matters of strategy. *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000).

Defendant ultimately asserts that the prosecutor argued facts not in evidence during closing argument. We disagree. Prosecutorial misconduct claims are reviewed case by case, examining any remarks in context, to determine if the defendant received a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

Specifically, defendant refers to the prosecutor's suggestion that defendant's alibi witness was referring to notes when he spoke with police over the phone. However, a prosecutor may argue that a witness's testimony is not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). A prosecutor is also permitted to argue reasonable inferences from the evidence. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). In the case at bar, the prosecutor's remarks during closing argument were reasonable inferences based on the facts. While defendant claimed that he was with a friend at the time of the shooting, several witnesses' identified defendant as the shooter. Thus, it was reasonable for the prosecutor to argue that the testimony of defendant's alibi witness was contrary to the testimony of other witnesses.

Affirmed.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen
/s/ Robert J. Danhof

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE AS ADOPTED BY THE COURT, PURSUANT TO 28 U.S.C. 2072

APRIL 22, 1993.—Referred to the Committee on the Judiciary and ordered to be printed

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U.S. GOVERNMENT PRINTING OFFICE
67-105 WASHINGTON : 1993

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 22, 1993

Dear Mr. Speaker:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Criminal Procedure and an amendment to Rule 8 of the Rules Governing Section 2255 Proceedings that have been adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code. While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

William H. Rehnquist

Honorable Thomas S. Foley
Speaker of the House of Representatives
Washington, D.C. 20515

Agenda E-19 (Appendix B)
Rules
September, 1992

TO: Hon. Robert E. Keeton, Chairman
Standing Committee on Rules of Practice and Procedure

FROM: Hon. Wm. Terrell Hodges, Chairman
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT Report on Proposed and Pending Rules of Criminal Procedure and Rules of Evidence

DATE: May 14, 1992

I. INTRODUCTION

At its meeting in April 1992, the Advisory Committee on the Rules of Criminal Procedure acted upon proposed or pending amendments to a number of Rules of Criminal Procedure. This report addresses those proposals and the recommendations to the Standing Committee. A GAP Report and copies of the Rules and the accompanying Committee Notes are attached along with a copy of the minutes of the Committee's April 1992 meeting.

II. RULES OF CRIMINAL PROCEDURE PUBLISHED FOR PUBLIC COMMENT.

In July 1991, the Standing Committee approved amendments in a number of Rules and directed that they be published for public comment. Comments were received on several of the proposed amendments and were carefully considered by the Advisory Committee at its April 1992

meeting. The following discussion briefly notes any significant changes in the language of the proposed amendment and the Committee's recommended action:

A. Rule 12(i). Production of Statements.

This amendment, which requires production of a witness's statements after he or she has testified at a pretrial suppression hearing, received no written comments. The amendment was approved by the Advisory Committee by a unanimous vote. The Committee recommends that this amendment be approved and forwarded to the Judicial Conference.

B. Rule 16(a). Disclosure of Experts.

As approved for publication, the amendment to Rule 16(a) closely tracked a similar amendment to Civil Rule 26. After considering public comments to the Rule, including strong opposition from the Department of Justice, the Committee by a vote of 6 to 5 (The Chair cast the tie-breaking vote) approved a modified amendment which requires production of a "summary" of the expected expert testimony, etc. The Advisory Committee recommends that the amendment to Rule 16(a) be forwarded to the Judicial Conference.

C. Rule 26.2. Production of Statements.

This amendment requires production of a witness's statements after the witness has testified at trial; it recognizes similar amendments in Rules 12.1, 32(f), 32.1, 46 and in Rule 8 of the Rules Governing § 2255 Hearings. Those few comments which were received on this Rule were generally supportive of the amendment. The Committee, however, ultimately deleted references in the Rule to the fact that the witness's prior statement could be ordered disclosed after the court had considered the witness's "affidavit." Now, only the witness's "testimony" triggers the disclosure requirements. The amendment was approved by a 9 to 1 vote with one abstention.

The Advisory Committee recommends that the proposed amendment be approved and forwarded to the Judicial Conference.

D. Rule 26.3 Mistrial.

Rule 26.3 is a new rule which requires the trial court to obtain the views of both sides before ruling on a mistrial motion. Only one comment was received on this amendment and it was favorable. No major changes were made